United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

B
P/S

74-2484

To be argued by
HERBERT A. LYON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2484

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK J. BRASCO,

Defendant-Appellant,

JOSEPH BRASCO,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX

LYON & ERLBAUM
Attorneys for Defendant-Appellant
123-60 83rd Avenue
Kew Gardens, N. Y. 11415
263-3235

HERBERT A. LYON
GRETCHEN WHITE OBERMAN
SPIROS A. TSIMBINOS
WILLIAM M. ERLBAUM
CHARLES WENDER
Of Counsel

UNITED STATES COURT OF APPEALS
FILED
MAR 20 1975
SECOND CIRCUIT

3

TABLE OF CONTENTS TO BRIEF

	PAGE
Replying to Respondent's Statement of Facts	1
POINT I	
REPLYING TO RESPONDENT'S POINT I - CONCERNING APPELLANT's RULE 33 MOTION FOR A NEW TRIAL	7
(a) THE FACTS	7
(b) THE REPEATED UNAUTHORIZED AND UNSUPERVISED SEPARATION OF SEQUESTERED JURORS	10
(d) THE NEWSPAPER INCIDENT	12
POINT II	
REPLYING TO RESPONDENT'S POINT II - CONCERNING STATUTE OF LIMITATIONS AND PRE-INDICTMENT DELAY	14
(a) STATUTE OF LIMITATIONS	14
POINT III	
REPLYING TO RESPONDENT'S POINT III - CONCERNING THE INSUFFICIENCY OF THE PROOF TO ESTABLISH A CRIME	21
POINT IV	
REPLYING TO RESPONDENT'S POINT IV - CONCERNING THE READBACK OF MASIELLO's FORMER TESTIMONY	26
POINT V	
REPLYING TO RESPONDENT'S POINT V - CONCERNING THE FIFTH AMENDMENT VIOLATION AND VARIOUS OTHER PREJUDICIAL ITEMS	28
POINT VI	
REPLYING TO RESPONDENT'S POINT VI-CONCERNING THE MAFIA AND MEADE ESPOSITO	31
Marshalls in the Courtroom	31
CONCLUSION	
FOR ALL THE FOREGOING REASONS, THE JUDGMENT APPEALED FROM MUST BE REVERSED AND THE INDICTMENT DISMISSED. ALTERNATIVELY, THE CASE SHOULD BE REMANDED FOR A NEW TRIAL	32

TABLE OF CONTENTS TO SUPPLEMENTAL APPENDIX

PAGE

GOVERNMENT'S EXHIBIT 24---------- SA-1

DEFENDANT'S EXHIBIT A-1---------- SA-2

DEFENDANT'S EXHIBIT A-2---------- SA-3

TABLE OF AUTHORITIES

CASES

	PAGE
Baker v Hudspeth, 129 F2d 779, 783	10
Brooks v Tennessee, 406 U.S. 605 (1972)	30
Burdeau v McDowell, 256 U.S. 465 (1921)	8
Coolidge v New Hampshire, 403 U.S. 443, 488 (1971)	8
Griffin v California, 380 U.S. 609	29
Haas v Henkel, 216 U.S. 462 (1910)	
Harrison v U.S., 392 U.S. 219 (1968)	30
Johnson v Paterson, 475 F2d 1066 (10 Cir., 1973)	29
Miranda v Arizona, 384 U.S. 436 (1965)	8, 29
State v Hines, 195 So.2d 550 (S. Ct., Fla. 1967)	30
Taussig v McNamara, 219 F Supp. 757 (D.D.C. 1963)	23
United States v Agone, 302 F Supp. 1258 (S.D.N.Y. 1969)	20
United States v Archer, 486 F2d 670 (2nd Cir., 1973)	25
United States v Berger, 433 F2d 680 (2nd Cir., 1970)	26
United States v Briggs, 457 F2d 908 (2nd Cir.), cert. denied 409 U.S. 986 (1972)	19
United States v Brown, Dkt. No. 1847 (2nd Cir., 1975) Slip Op 1847	19
United States v Capaldo, 402 F2d 821 (2nd Cir.,) cert. denied 392 U.S. 989	18
United States v Cirillo, 468 F2d 1233 (2nd Cir., 1972)	26
United States v Cohen Cr	27
United States v Edwards, (366 F2d 853)	14
United States v Ellis, 461 F2d 962, 968 (2nd Cir.), cert. denied 409 U.S. 866 (1972)	8
United States ex rel Bruno v Herold, 408 F2d 125, 127 (2nd Cir., 1969)	26
United States ex rel Macon v Yeager, 476 F2d 613 (3rd Cir., 1973)	29
United States v Ferraro, 458 F2d 868 (2nd Cir.), cert. denied 408 U.S. 931 (1972)	19

CASES

	PAGE
United States v Franzese, 392 F2d 954 (2nd Cir., 1968)----------	25
United States v Gaynor, 472 F2d 899 (2nd Cir., 1973)----------	8
United States v Johnson, 383 U.S. 169 (1966)----------	2
United States v Johnson, 419 F2d at 60----------	24
United States v Lewis, 161 F2d 683 684 (nd Cir., 1947)----------	14
United States v Mallah, 503 F2d 971 (2nd Cir., 1974)----------	19
United States v McConney, 329 F2d ~~407~~ 467 (2nd Cir., 1964)----------	29
United States v Peltz, 433 F2d 48 (2nd Cir.),----------	22
United States v Quinn, 111 F Supp. 870 (E.D.N.Y. 1953)----------	23
United States v Scandifia, 390 F2d ~~680~~ 244 (2nd Cir., ~~1970~~ 1968)----------	26
United States v Sweig, 441 F2d 114 (2nd Cir.),----------	

PROPOSED RULES

A.B.A. Standards, Trial by Jury, Section 5.7a, p. 172----------	11

STANDARD REFERENCE WORKS

21 Am. Jur. 2d 1356----------	30

APPELLANT'S REPLY BRIEF

REPLYING TO RESPONDENT'S STATEMENT OF FACTS

Appellant submits this reply brief to correct the many distortions, misconceptions and false conclusions presented by the Government in its brief. Throughout its statement of facts and proof of guilt point, the respondent uses broad strokes to paint for this court a picture of the appellant as a lying scheming corrupt Uriah Heep who has shamefully defrauded the government and violated the public trust. The respondent along these lines even resorts to presenting as evidence before this court items which were specifically admitted by the court below for limited purposes only. Thus Government Exhibit 51 is characterized by the government in its brief at page 37 as being "conclusive corroboration of Weiner's testimony that he had in fact discussed a loan to A.N.R. with Brasco", even though the exhibit was specifically accepted by the court below "not for any proof of the contents" (T 37, 1545, 1548). The respondent's characterization of the appellant is totally unsupported by the record and is inconsistant with the testimony of seventeen persons from all walks of life, including congressmen, judges and former F.B.I. officials, who testified as to the good character and integrity of Frank Brasco, as well as the relatively modest sentence which was imposed by the court below, obviously reflective of this appellant's background and the dubious nature of the government's case. Despite the government's presentation to this court of the appellant as some sort of "monsterous ogre" one searches the record in vain to discover, first of all, how the government was in any way defrauded and where the government has proven beyond a reasonable doubt criminal acts by the appellant. On the contrary, the government's technique appears to be based on the old tactic, where if your case is weak, shout loud and bang on the table and maybe someone will believe you.

To highlight a few of the respondent's exaggerated claims we note

references in its brief to Brasco as "the principal figure in the conspiracy" (Res. Br., p. 3), the statement that Brasco from June to November 1968 schemed to assist Masiello to retain contracts (Res. Br., p. 4), and the inference that Brasco and Doherty illegally arranged first for initial bids to be disqualified, and secondly, to have E.G. Maintenance (Lehigh) eliminated in the October bids (Res. Br., p. 3, 4, 7, 15, 16). In this regard Masiello himself stated that after his initial inquiry to Brasco's office,*/ where he presented himself as a substantial businessman, he thereafter called Joe Doherty whenever he had a problem or question (T 1139, 1634-1636). Masiello also stated that he had been doing business on his own with the government for years and that after May 31, 1968 he did not call or see Frank Brasco (T 1244), or in fact Doherty or Weiner (T 1234). Thus, the respondent asks us to infer a scheme where the party alleged to have been assisted never contacts the assistants and where the record reveals that he instead proceeded on his own through a group of his local contacts to make his own arrangements (T 1650, 1817-18, 1599). The respondent further asks the court to believe that Brasco's "scheming" took place during a time when Doherty had in fact left the post office and where Weiner and Doherty had had a violent argument and were not even speaking to each other (T 577).

Further, throughout the trial there was also no claim by the government of any wrongdoing by any of the postal officials who testified. Testimony on the contrary was that their actions were taken in the regular course of the ordinary activities by the Post Office. The decision to invalidate the June 1967 bids was based upon a legal opinion that the procedure had been invalid and all bidders were allowed to resubmit their bids. It was also, in fact,

---

*/ Respondent attempts to imply that Masiello being a Bronx trucker could not legitimately have been a routine constituent with a problem, because Brasco was a Brooklyn congressman (Res. Br., footnote cit. at p. 38). Respondent fails to recognize that Brasco was the only New York City member of the House Post Office Committee; thus, where else would a New York trucker with a postal problem go?

established that E.G. Maintenance (Lehigh) was properly disqualified since the company failed to obtain a proper SBA certificate as competent to perform. The government presented not one shred of evidence that the SBA determination was in any way improper.

Respondent's righteous claim that the government was defrauded, is refuted by the fact that Masiello lost money on the A.N.R. contract, that he was never paid for mileage and fuel, and that the post office received good service which it wanted to keep even after failing to give A.N.R. and Randen formal contracts. In the letter of cancellation of October 23, 1968 to Randen, for example, Postmaster Strachan expressly states "we desire however to continue to hire your tractors on an emergency basis until an award is made" (G X 24). Further in December when Masiello was leasing his trucks to Bermur Corp., Strachan sent Masiello a copy of a letter to Bermur regarding damage to the trucks (Def. X A-1-2). Respondent also imputes sinister motives to Brasco for meeting with Masiello, although at the same time the Post Office and the SBA were dealing with him during the course of many years. The SBA had in fact given Masiello's companies perhaps a million dollars in loans (T 1257, 1264-1267, 233 -2336).

The respondent also takes substantial liberty in labeling minor inconsistencies or lapses of memory on the part of Frank Brasco as being false perjurious and in making "Brasco a liar" (Res. Br., p. 18, 29). At the same time, respondent dismisses the numerous inconsistencies in the testimony of the government witnesses (of which respondent itself cites several examples [Res. Br., p. 10, 13, 24]), as being merely innocent lapses of memory. The case at bar, because of the many years which passed from the dates of the alleged incidents to the dates of trial, became one of reconstruction for both sides. Numerous prosecution witnesses testified that they had no independent recollection of dates and events and had their memories refreshed in discussions with Mr. Shaw and through being shown numerous documents (T 367, 370, 384, 392,

408, 479, 487, 489, 490, 500, 508, 516, 523, 548, 565, 583, 1420, 1423, 1448, 1656, 1661, 1825, 2987). During the trial for example, it was established that although Doherty's diary showed an April 11th meeting with Brasco, Doherty was in Georgia on that date and further with regard to the November 15th meeting at the Rotunda Restaurant, Brasco was back in New York on that date, about to depart on his Pennsylvania talk.

Masiello also stated in fact that he wasn't sure of which time of year he had been talking about or even which year (T 1657). Douglas Noble and Howard Cook, whose testimonies the respondent states severely damaged the appellant's credibility, themselves had no independent recollection of the meeting in question until the discovery of an office memorandum discovered by Nobles during the progress of the trial but never made available to Brasco except during his cross-examination in an effort to confound him (T 2913, 2930, 2931, 2965, 2966). Brasco, on several occasions in his testimony, stated he did not remember specific dates and incidents (T 2222-2226). While respondent offers no reasonable explanation for the numerous inconsistencies in the testimony of its own witnesses, it proceeds to pin scandalous labels on the appellant because of genuine lapses of memory actually caused by the prosecution's pre-indictment delay (See Appellant's Point II, main brief and below). The prosecution further classifies all conflicts in testimony between the appellant Brasco and the prosecution witness in favor of the prosecution and dismisses the appellant's refutation of the testimony of prosecution witness with glib comments such as "outrageous" and "incredible". The respondent in effect takes the position that the appellant was under the burden of proving innocence beyond a reasonable doubt rather than the contrary standard as required by law (See Res. Br., p. 51 footnote).*/ One need only

*/ Respondent ridicules Brasco's admitted inability to remember by pointing out that he does claim to remember certain incidents. So did the prosecution witnesses.

point to the nature and testimony of the three men, Masiello, Weiner, and Doherty, to find substantial doubt about their credibility. Their reputations and backgrounds as criminals and liars was firmly established*/ and no amount of temporizing by the government can change that fact. While the prosecution asks this court to accept the testimony of Weiner and Doherty as being conclusive proof, it must be pointed out that the Government both prior to and during the trial had its own doubts about their credibility. Both the testimony of Weiner and Doherty was available to the Government as of 1970 and no indictment resulted. Henry Peterson of the Justice Department, in fact, was quoted at one point as stating that Doherty's testimony was not credible. Mr. Shaw, during the trial also admitted that he had told Weiner not to say certain things during his testimony because he:-

> "Simply didn't want to have the government's case on whether money had been paid linked to Weiner's credibility. Weiner has a great many credibility problems". (T 1571)**/

---

*/ For example, it was established that the letter from Washington Finance to A.N.R. was in reality a "phony" (T 453, 1436) and that Washington Finance had declared bankruptcy in February of 1968 (T 1440-1444), three months prior to the time it was supposed to give A.N.R. a loan. One might also note the benefits reaped by each of these three witnesses in return for their testimony, an area conveniently not commented upon by the respondent.

**/ The government attempts to bolster the testimony of Doherty, Masiello, and Weiner by claiming that such witnesses as May, Noble and Cook corroborated their testimony and that these witnesses had no reason to attack Brasco but were in fact favorable to him. (See Res. Br., p. 5, 32, 33, 39, 87). The testimony of May, Noble and Cook was not really relevant to the main issue of whether Brasco had conspired to defraud the government. Cook and Noble, in fact, were not called on the prosecution's main case but were called as rebuttal witnesses. It should further be noted that May, Cook and Noble were friends of Doherty's and had been associated with him in the post office. These officials would naturally be apprehensive about their own positions since Masiello had been doing business with the post office for many years. Doherty, in fact, during the trial acknowledged that a government memoranda sent to Henry Peterson contained reference that he had initially told government agents that Timothy May had assisted in helping A.N.R. procure the contract (T 548-550). Thus, the three witnesses in question would have ample motive to shade their testimony.

The Government's attempt to link Frank Brasco to the alleged $10,000. payment made by Masiello to Ferraro and then over to Joe Brasco (Res. Br., p. 85) is undercut by Masiello's own testimony that he never arranged for any money to go to Frank Brasco and never complained to him that he had given anyone $10,000. (T 1726, 1738). Masiello further testified that he gave the $10,000. in May of 1968 while Doherty stated that Sullivan gave him his share of $2,000. in November of 1967. Weiner on the other hand, couldn't even state the amount of the alleged bribe indicating he thought $20,000. had been given (T 1571-1583). It is no wonder then that after stating that appellant "Brasco's brief is laden with false statements" the respondent is forced to admit that our claim that Brasco received no money or personal benefit is at least "technically accurate" (Res. Br., p. 85).

The conclusion of guilt which respondent states must be drawn from the proof upon close analysis appears to be totally illogical. For example, the presentation of Doherty's writing on Brasco's congressional stationery is used by respondent as proof that the Masiello meeting took place in Washington, D.C. Respondent thus argues "Frank Brasco was able to offer no explanation for how Doherty made these notes if not at a meeting with Masiello in Brasco's office" (Res. Br., p. 10). Doherty's own testimony reveals that he saw Brasco on a regular basis to discuss legislative, constituent, and political matters and was thus constantly in and out of the Congressman's office. Masiello testified that he knew nothing about E.G. equipment (T 1284). But the notes said E.G. had no equipment (G X 28 A and B ~~G X 284~~). The notes couldn't have been made during an interview between and among Doherty, Masiello and Brasco. They had to be made later. Also see defendant's Exhibit A, a memo in the case written on the railways letterhead although no one claims any meeting occurred in a railroad station.

The government's statement of facts thus takes substantial liberty with the record in drawing conclusions totally unsupportable by the evidence. Appellant can only surmise that the shallowness of its case has inspired such techniques.

POINT I

REPLYING TO RESPONDENT'S POINT I - CONCERNING APPELLANT'S RULE 33 MOTION FOR A NEW TRIAL.

The Government, by half-truth and clever juxtaposition of unrelated incidents, has tried to blunt the force of appellant's argument that the verdict must be set aside because of repeated violations of the jury sequestration order, as well as improper exposure of jurors to a newspaper article directly related to the trial (App. Point I, pp. 38-71), and the government employs ad hominum attacks on defense counsel. The record shows that these attacks are unwarranted and diversionary.

(a) THE FACTS

In July, 1974, Dominic Barbarino, a personal friend of appellant, dropped in on one of the alternate jurors (who had not participated in deliberations) and learned from him of various violations of the sequestration order (Min. 10/8/74, pp. 4-5). He then made similar inquiries of other jurors to see if they would confirm what the alternate had said. During one such conversation with Juror Purpo, she told him about the newspaper incident and she asked Barbarino to take her to see Mr. Lyon. In a telephone conversation, several days later, Purpo stated to Barbarino, "...I'm sorry that I had -- you know -- taken you to the trouble of taking me to Mr. Lyon's office -- his home -- and discussing it ...".*/ It was at this point that Lyon became aware of Barbarino's activities (Min. 10/8/74, p. 5). Barbarino's activities were not undertaken at Lyon's direction and neither he nor Mullen (who accompanied Barbarino on one interview) were acting on Lyon's behalf (Min. 10/8/74, p. 12). The trial court specifically found that Barbarino had done nothing improper during the interviews (H. Min. 386-387).

When the trial court enjoined all parties from interviewing jurors except under court supervision, the defense complied with the court order. The prosecution did not. Mr. Shaw began a private investigation, not under court

*/ Excerpt from a telephone conversation between Purpo and Barbarino, on 9/18/74, about 8:30 P.M.

auspices, but using the grand jury as a device to conduct some of his ex parte interviews. When defense counsel asked that the court's injunction cover the prosecution as well, the trial court refused to call a halt to the prosecutor's investigation (Min. 10/16/74, p. 4).

If we assume that Barbarino acted improperly (though the trial court found otherwise) merely by conducting ex parte interviews of jurors not under court auspices, then the Government was guilty of precisely the same misconduct. And, if (as the Government suggests, Res. Br., 68) the exclusionary rule should be applied in this case to exclude evidence, the exclusion must run only to the fruits of the Government's ex parte investigation. The exclusionary rule is designed only to deter the Government -- not private citizens -- from obtaining evidence in an illegal manner. Burdeau v McDowell, 256 U.S. 465 (1921); Coolidge v New Hampshire, 403 U.S. 443, 488 (1971); U.S. v Ellis, 461 F2d 962, 968 (2nd Cir.), cert. den. 409 U.S. 866 (1972).

As to Mr. Lyon's own activities, they were unrelated to those of Barbarino -- despite the Government's attempts to forge a relationship by juxtaposing the two incidents. Mr. Lyon made himself available for Robbins to see, so that she could speak to him or not, as she chose. She took the initiative and invited him into her home, just as she invited him back to meet other jurors for dinner.*/

Neither Miller (403 F2d 77) nor Driscoll (276 F Supp. 333) prohibits a juror from speaking to defense counsel, nor prohibits defense counsel from listening to what a juror wishes to say. By the way of analogy, while Miranda v Arizona, 384 U.S. 436 (1965) prohibits a Government agent from questioning a suspect who declines to speak, it does not prohibit that agent from putting himself in a position to receive a spontaneous admission. U.S. v Gaynor, 472 F2d 899 (2nd Cir., 1973).

Moreover, both Miller and Driscoll were concerned with the power of the District Court to enjoin defense-initiated interrogation of jurors which had been conducted with gross impropriety. No such issue was present in this case. And in

*/ Neither Hutton, nor Dianne Halley, whom Robbins invited to meet Lyon, ever mentioned the newspaper incident to him during their cordial hours together, nor did Robbins.

holding that this power existed, Driscoll was careful to note that both the AmericanBar Association's Professional Ethics Committee and the Professional Ethics Committee of the Association of the Bar of the City of New York have found no impropriety in an attorney's speaking to jurors after the verdict is in "'as a matter of self-education, or where necessary to prevent fraud or a miscarriage of justice...'". U.S. v Driscoll, supra, 276 F Supp. at 339.

The Miller case, which the Government leans upon so heavily, interestingly enough was, according to Judge Friendly, one of the few cases which would meet his exacting criterion for collateral attack — that a defendant must make "a colorable showing of innocence". "Is Innocence Irrelevant: Collateral Attack on Criminal Judgments", 38 U. Chi. L. Rev., 142, 160 (1971). Moreover, there was no suggestion in Miller that a defendant who obtains information of gross jury impropriety is barred from using that information in an attempt to correct the harm which has been done to him.

The "New York Post incident", as the Government seeks to call it, is another piece of skillful tailoring. First, the article was never identified as the "New York Post" article. While Hutton stated he "believed" the Post story was the one he saw (H. Min. 59), Purpo testified that Petitioner's Ex. A (reproduced in Pet. Appendix, A 59 and renumbered Pet.'s Ex. 2) might have been the article (H. Min. 21). Indeed the Government acknowledges that Purpo testified "Hutton showed her a copy of either the New York Post or the Daily News..." (Res. Br. p. 64). The Government has soft-peddled Purpo's testimony, probably because the article Purpo referred to states:-

> "Sources close to the case said Masiello declined to testify because he was worried about the consequences his testimony might have on his wife Elizabeth's health.
> "She was reportedly upset about stories the mob had taken out a contract on her husband's life because of his cooperation with the Government."

The Government has also forgotten to include in its facts Rivera's testimony that she saw Purpo "read" the article before she gave it back to Hutton.

(Compare Res. Br. 65 and H. Min. 114) And Benjamin's testimony that perhaps Hutton made a comment about the article "to a group in attendance there and we called the marshal"; as well as his testimony that he had "heard (Hutton) say, make some statement about an article"; as well as his testimony that he "can't answer" if he saw Hutton do anything with the paper. (Compare Res. Br. 65 with H. M. 108, 110, 111). And Rambach's testimony that after Hutton found the article, "he held it up and talked about it". (Compare Res. Br. 65 with H. M. 271-272).

(b) THE REPEATED UNAUTHORIZED AND UNSUPERVISED SEPARATION OF SEQUESTERED JURORS.

The Government has also chosen to answer isolated and selected portions of our argument, without addressing itself to the principle questions we have raised, namely:

1) Whether, when there is conceded evidence of repeated violations of a sequestration order -- not a single violation as occurred in the Berger case (433 F2d 680) or a consented-to separation during deliberation proceeded by careful instructions not to speak to anyone about the case as in Breland (376 F2d 721) -- the court should apply the "strict rule" followed in the 7th circuit and various state jurisdiction (see cases cited App. Br. 49) on the theory that since the jurors, and their custodians, had so little regard for the conditions of sequestration that they continually came into unsupervised contact with outsiders, then it can also be assumed that they had equally little regard for their obligation not to discuss the case with outsiders, or listen to whatever may have been said about appellant.

2) Even assuming the "strict rule" is not followed, then under all other authority, including Baker v Hudspeth, (129 F2d 783) -- none of which is discussed by the Government -- the rule is that when unauthorized separations from a sequestered jury have occurred, the Government must prove that the separating jurors were not subject to any noxious influence. (App. Br. 50).

Instead of answering these arguments, the Government first faults the defense for not offering proof of improprieties during the unauthorized separations (Res. Br. 70) -- even though it earlier admits that the trial judge ruled he was limiting the proof only to the newspaper incident. (Res. Br. 68-69)

The Government then relies upon a false "floodgates" argument, to the effect that a hearing in this case would mean a post-trial hearing "on demand in every single criminal trial" because unsequestered jurors routinely separate and are subject to outside influence which may be prejudicial. (Res.Br. 71)

The absurdity of this argument lies in the fact it ignores the differences between a sequestered and a non-sequestered jury.

A jury is not sequestered when there is no real danger that the jurors will be exposed to prejudicial outside influences when they separate. A jury is sequestered in order to prevent jurors from separating and having any contact with outsiders precisely because the nature of the case is such that the potential for prejudice exists in any such outside contact. The unsequestered juror is instructed each time he separates as to what he can and cannot do, see, and read. In the absence of proof to the contrary, courts assume that this instruction is faithfully obeyed. The sequestered juror is never given such instructions, because he is presumed not to come into contact with any outside source because he is presumed to obey the sequestration order.

Thus with the unsequestered juror, the presumptions are (1) that any outside contact is not prejudicial and (2) that even if a prejudicial contact is attempted, the juror will ignore it because of the court's daily instructions. The defense thus has the burden of proving that "the capacity for adverse prejudice inheres" in the outside contact. ABA Standards, Trial By Jury, Sec. 5.7a, p 172.

The presumptions are exactly the opposite where the jury is sequestered. Any unauthorized outside contact is presumptively prejudicial -- else why sequester in the first place. And merely by showing that an unauthorized separation has occurred, the defendant has sustained his burden of going forward. Moreover, it

cannot be presumed that the juror disregarded any potentially prejudicial contact, because the juror who separates has ipso facto violated the court's instructions.

(d) THE NEWSPAPER INCIDENT

Respondent argues that the trial court's finding that Purpo had not read the article was not clearly erroneous, on the ground that the court could properly have disregarded evidence of her prior inconsistent statements testified to by Barbarino, Lyon and Erlbaum. The first answer to this argument is that Purpo was never recalled to the stand to deny making these prior statements after the three men testified she had done so. Since the trial court never found that Barbarino and the two attorneys lied when they testified she made the statements, there is no basis in the record for a finding that the prior inconsistent statements were never made by Purpo and could properly be disregarded. Second, in crediting Purpo, the trial judge also completely disregarded Rivera's in-court testimony that she saw Purpo read the article, on an erroneous legal theory (App. Br. 61-62). Third, the Government disregards the effect of Purpo's admission that she assisted Hutton to destroy the article, thereby evidencing a consciousness of guilt (App. Br. 64). Lastly, the Government fails to acknowledge that the trial court failed to find that Hutton's denial of reading the article could be credited (App. Br. 64).*/

*/ (Res. Br., p. 70-2nd footnote) As to respondent's claim that the tape-recording corroborated Purpo's testimony that she had not read the article respondent is in error. Purpo said, "Ed would have to see it. Ed read it more than I did". (Purpo tape-9/30/74) This was stated in response to Barbarino's questioning in regard to whether she could identify the article and would relate its contents. Purpo had already explained to Barbarino in a previous tape (Purpo tape-9/18/74) she had changed her mind because of her mother's fears and she had decided not to come forward until other jurors did. Listening to both Purpo tapes makes it clear that Purpo had been influenced by her mother's fear and decided to retreat from her previous statement. Her suggestion that Ed (Hutton) would have to see it was consistent with her position (stated in tape of 9/18/74) that she had decided not to be the only juror to come forward but would wait until other jurors came forward.

(Purpo tape - 9/18/74) M.P.-Marie Purpo
B. -Barbarino

M.P. "Mr. Barbarino, I don't know if you are aware of what occurred Friday night but my mother got frightened....Yes, but she had contacted the police and the police went ahead and contacted the F.B.I. and Intelligence Unit and what have you. " (footnote continued)

In arguing that no prejudice existed even if Purpo and Hutton read the article, the Government makes the unwarranted assumption that the article found and read that night was the Post article. Purpo and Hutton destroyed the article, instead of giving it to the marshals with a request that it be taken to the trial judge. By their own acts, bespeaking consciousness of guilt, they made it impossible for the facts to be reconstructed. Moreover, Purpo admitted that it was equally possible the article was from the Daily News, which explicitly states that Masiello refused to testify because of his wife's reaction to stories "the mob had taken out a contract on her husband's life because of his cooperation with the Government".

Footnote continued from previous page:

B. "Yeah, no kidding.

M.P. And I consented to her request and I am not going to do anything about it. I'm going to beg out of the situation and unfortunately I am sorry that I had gone - taken you to the trouble of taking me to Mr. Lyon's office and home but she was very frightened and she would like me to....

B. What is she frightened about, Marie?

M.P. You know, she got her wits scared out of her.

B. This comes as a blow - we were counting very, very heavily on you. You gave us the inside as to what transpired and what went on. It was very, very interesting and it helped Frank tremendously. There was nothing that was wrong or off-color. Everything was just as stated. You know - you related. No one put words in your mouth or anything like that. I don't see why she got so upset and you know - where....

M.P. Well I have also been thinking about it too. If at any other time that you do meet with any other jurors and they too consent to doing this, perhaps I might change my mind also. I don't want to be the only one doing it."

Obviously, Purpo's mother's fear came from Purpo's failure to call home as Barbarino had suggested. It is also clear that after her mother called the police and the F.B.I. etc., she decided that she would retract what she had told Mr. Barbarino previously which he said had helped tremendously without any denials from her. Purpo waited for the other jurors and when she saw that Hutton was evasive and contradictory she took the same posture.

Under these circumstances, it is impossible to find that the newspaper incident was innocuous and had no potential for prejudice, under the proper legal standard -- an objective assessment of the potential for prejudice inherent in the article (App. Br. 64-67) and in the circumstance that no instructions were given by the trial court to disregard the article because the jurors destroyed the article, thereby preventing the incident from coming to light (App. Br. 67-69).

All of the cases cited by the Government (Res. Br. 73-74)*/ in arguing that no potential for prejudice existed, are ones in which the jury was not sequestered and where the trial court took prompt, corrective action to insure that the jury would disregard the publicity. No such remedial action was possible here because the jurors "covered up" (H. Min. 24) the fact that they had seen the article by destroying the evidence.

POINT II

REPLYING TO RESPONDENT'S POINT II - CONCERNING STATUTE OF LIMITATIONS AND PRE-INDICTMENT DELAY.

(a) STATUTE OF LIMITATIONS

The Government has misstated our argument. We do not assert that the prosecution is time barred "because the Government allegedly failed to prove an overt act after October 23, 1968, when the five-year period prior to the return of the indictment on October 23, 1973, commenced". (Res. Br., 76) We have argued that the prosecution is time barred because the Government failed to present any proof that the "scope of the conspiratorial agreement" encompassed those acts which the Government relied upon to establish that the conspiracy continued after the ANR cancellation.**/

The only "evidence" which the Government can muster in support of its

*/ except U.S. v Edwards (366 F2d 853) where the publicity was about the defendant's brother, who was not on trial, and the news story did not mention the defendant.

**/ As this court held in U.S. v Lewis, 161 F2d 683, 684 []nd Cir. 1947]):

> "It is true that conspiracy is a continuing offense so long as any concerted action continues; but even in conspiracy the concert may end and only the 'result' remains, and in that event the statute of limitations runs from the end of the concert which may be the last overt act". (emphasis added)

erroneous argument that the conspiracy continued to exist after mid-June, when Brasco learned that the ANR cancellation could not be rescinded, is its own indictment. (Res. Br. 77) Beyond the unproven allegations in the indictment that from June to November, Brasco "arranged to assist and did assist Masiello in obtaining truck leases for other corporations..." (Res. Br. 77), the Government cannot come forward with one shred of proof that Masiello asked Brasco for help to obtain truck leases for other corporations after Masiello learned, on May 31st, that the ANR contract was cancelled, that Brasco rendered any assistance to Masiello to obtain the leases, or that any further assistance from Brasco was necessary or was contemplated by the former conspirators after May 31st.

On every page of its Statement of Facts -- until reaching May 31, 1968 -- the Government makes at least one mention of Masiello's seeking out Brasco for help and/or of Brasco's taking affirmative action to render the assistance sought by Masiello. (Res. Br. 7-30) Thus Masiello seeks out Brasco for assistance in getting the June, 1967 bids thrown out and Brasco arranges for this to be done. (Res. Br. 7-13) "Frank Brasco...coached Masiello on what bid he should submit" in September, 1967 (Res. Br. 15-16); Masiello meets Brasco on the one lease in March, 1968 (Res. Br. 18-19); Masiello asks Brasco for help on a loan (Res. Br. 19-20); Masiello meets Brasco on the loan in April, 1968 (Res. Br. 22-24); Brasco arranges "for the post office to notify Masiello the contract will be extended" (Res. Br. 27-29). All of this is evidence from which the jury could infer that a conspiracy between Masiello and Brasco existed during that period.

On the pages dealing with the period after May 31st, there is no mention of any call for help from Masiello to Brasco, no proof of any assistance rendered by Brasco -- in short, nothing to prove that Brasco was part of Masiello's post-May 31st efforts with Kihl, et al at the 34th Street Post Office to obtain the June 15th bid and lease for Randen by concealing the ANR - Randen

connection.*/

Indeed, the proof that no further participation by Brasco in Masiello's efforts to obtain Post Office business for Randen was contemplated after May 31st comes from Masiello himself -- he only called Joe Brasco after the Randen bid had been accepted on June 27th. (T 1818) By his own admission, Masiello did not call Joe for any help. (T 1818) The alleged Annapolis meeting with Doherty in July, which the Government insists on characterizing as an attempt by Brasco to assist Masiello in obtaining the Randen contract, came after Randen had already won the June 27th bid. Brasco's alleged November 15th meeting with Doherty also occurs on the date that the ANR, Tab and Bermur bids were submitted. It is absurd to believe that Masiello wanted or needed to have Frank Brasco ask Doherty for advice after those bids had been prepared and filed, especially since the Government's proof shows that Masiello never told Joe Brasco about the Bermur bid, and Frank Brasco had no knowledge of it when he spoke to Doherty. Masiello never spoke to appellant after May,1968.

Not only does the Government fail to establish that the conspiratorial agreement included any role for Brasco in the Randen scheme after the ANR cancellation on May 31st, but the Government's own evidence shows that no conspiracy whatsoever existed on or after October 23, 1968, to obtain Post Office business by concealing Masiello's interest in Randen or in Bermur.

After Randen won the June 27th bid, the Post Office undertook an investigation to determine whether Masiello was connected to Randen. Upon receiving proof that there was a connection, Postmaster Strachan notified Randen on October 23, 1968, that the Randen bid was rejected because the firm lacked "the requisite integrity". (G X 24; SA-1)**/ The same letter informed Randen that the Government desired to continue hiring Randen tractors until a new award was made. Thus, on and after October 23rd, Masiello got Post Office business for Randen legitimately,

*/ One would expect that if Brasco had really been a part of the conspiracy after May 31st, that Kihl, Maisto, Albanese, Daly and DiMasi would have been named as unindicted co-conspirators so that their testimony or hearsay could be introduced to prove Brasco's role. See U.S. v Masiello et al., 69 CR 417, Docket # 34969, remanded - 434 F2d 33 (2d Cir., 1970); aff'd 445 F2d 1324 (2d Cir., 1971)

**/ "SA" refers to pages of the Supplemental Appendix, submitted herewith.

without having to conceal his connection to the company.

At this trial, as well as in the prior mis-trial, the Government withdrew any claim that Bermur Leasing was a Masiello-controlled company or that Bert Brodsky, Bermur's president, had acted improperly or illegally in getting the Bermur bid accepted. The Government proved that Masiello got Post Office business after October 23rd by leasing his trucks to Bermur. That the leasing agreement was fully known and approved by the Post Office is established by Def. Exs. A1 and A2, consisting of duplicate letters to Bermur and to Masiello in December of 1968, notifying them both of an accident to a tractor-trailer rented from Bermur by the Post Office. (SA 2-3).

Thus, not only did the Government fail to establish that Brasco conspired with Masiello after May 31st to get Post Office business for Randen by concealing the ANR-Randen connection, but the Government also failed to establish the existence of any conspiracy whatsoever, on and after October 23rd, when the Post Office informed Masiello it was aware of his connection to Randen but nonetheless desired to continue to do business with Randen; or during theBermur phase, since Bermur got the bid legitimately and, once again, the Post Office did business with Bermur with knowledge that the Bermur trucks belonged to Masiello.*/

(b) PRE-INDICTMENT DELAY.

While acknowledging that the indictment in the case at bar did not occur until some four years after the investigation began, respondent argues that the appellant has not established significant prejudice or purposeful government inaction. As was already pointed out, during the four year passage of time key witnesses such as Michael Sullivan, Ralph Ferraro and Fitzell had died. Respondent states that appellant speculates that Sullivan, for example, could put the lie in Doherty's mouth. One can only wonder why Government agents could have conceivably failed to speak to Sullivan regarding this matter for the three and a half year period until death sealed his lips. Doherty had spoken to the Government in 1969 and 1970 and assuming

*/ The government withdrew overt acts regarding Bermur. Bermur won the bid. Masiello was not interested in T.A.B. nor in A.N.R.

his trial testimony was the same as the statements he initially made to government agents, why would not Sullivan (who could easily confirm or refute Doherty's alleged maneuvers with Brasco) have been spoken to? According to Doherty, for example, Sullivan was the one who suggested "getting money from 'Uncle Joe'"and was the one who gave Doherty the $2,000. Sullivan's testimony certainly was vital to the issue and the delay in prosecution on this matter alone constitutes substantial prejudice and an attempt by the government to obtain a profound tactical advantage.

Further, the passage of time caused lapses of memory and loss of documents. It is significant to note that while denying actual prejudice the respondent in its brief seizes on the failure of Brasco to recall certain incidents, just as it did during trial to brand him a liar and perjurer. As indicated earlier, the lapse of time created a situation where witnesses on both sides were unable to recall or remember. It was only by the process of reconstructing that memories were refreshed. In the reconstruction process the government certainly had the advantage because of its greater access to materials, and, in fact, certain long lost items, were not brought to the appellant's attention until the trial was actually in progress. (The memo used by Noble and Cook to refresh their recollection, for example).

Appellant also cannot understand what the government's statement that Brasco was put on notice in December of 1970 by the investigations by the F.B.I. has to do with the issue presented. One can only ask what was Brasco supposed to do? After the F.B.I. interview he didn't hear anything else about the matter, except the quotation in the press, from Henry Peterson of the Department of Justice terminating the case against Congressman Brasco because Doherty was not a credible witness. (App. Br., p. 103) Frank Brasco was not apprised of any further action inconsistent with this quote. Was this merely to serve as a seductive trap for the wary? This assumption is but another example of the respondent's apparent position that the appellant had the burden of proving his innocence in the case at bar. The cases cited by respondent in support of its position are easily distinguishable from the case at bar. United States v Capaldo, 402 F2d 821 (2nd Cir.)

cert denied 392 U.S. 989 and United States v Ferraro, 458 F2d 868 (2nd Cir.) cert denied 408 U.S. 931 (1972) were cases where no witnesses were lost because of the delay. U.S. v Briggs, 457 F2d 908 (2nd Cir.) cert denied 409 U.S. 986 (1972) involved only a two month delay and U.S. v Mallah, 503 F2d 971 (2nd Cir., 1974) involved a case of almost overwhelming proof of guilt and only a speculative inference that the delay prejudiced the defendant. Similarly in U.S. v Brown, Dkt. No. 1847 (2nd Cir., 1975) slip op 1847, no proof of how the defendant was prejudiced by the delay was presented. In the case at bar, however, appellant cited numerous specific instances of how the delay in fact did prejudice him. Respondent's contention that the government did not purposely delay to take tactical advantage in the case is not supported by the record. If Doherty implicated Sullivan in 1970, standard operating procedure required that Sullivan had to be questioned. Yet, the government would have us believe that from 1970 until Sullivan's death in 1973, no agent ever interviewed him. The utter failure of the record to contain any explanation by the government for such a glaring omission, or any testimony or exhibit documenting or confirming that Sullivan was in fact not questioned by any agent, should, appellant suggests, create a staggering inference against the government. On the other hand, and had an interview with Sullivan resulted in denials by him as to the truth of Doherty's claims, the government would have been under legal and moral compulsion to disclose Sullivan's denials to the defense, pursuant to Brady v Maryland, 373 U.S. 83 (1963). No such disclosure was ever made to the defense.

Nor does the government's self-serving claim that it was not seeking a tactical advantage in delaying the indictment until after Sullivan's death, erase the legitimate inquiry as to why Sullivan was never talked to (if he wasn't), why Weiner talked only after Fitzell was dead, and why Masiello talked only after Ralph Ferraro had died.*/ Further as respondent admits in its brief, Sullivan and Ferraro

*/ Contrary to respondent's inference in the footnote at p. 82, McKeever was available to the prosecution as well, and they chose not to call him either. McKeever at the first trial stated in fact that he never saw Joe Brasco - not that he never was present at the alleged payoff.

were not named as co-conspirators in the indictment but were only so designated in the government's Bill of Particulars. The government thereby was belatedly able to justify the admission of the hearsay statements of these witnesses. (See United States v Agone, 302 F. Supp. 1258 (S.D.N.Y. 1969). These tactics certainly cast doubt upon the government's position that its actions in the case were proper.

Respondent argues in effect that the United States Attorney's office in New York obtained Masiello in September of 1973 (Res. Br., p. 84). However, the Baltimore United States Attorney who abandoned the case with Department of Justice approval in 1970, is part of the same government as his New York counterpart in 1973. It is the government which must abide by the statute of limitations. It is the government which must avoid inflicting prejudicial pre-indictment delay. Diligence is its burden, not that of the unwary target.

It was the government not appellant who was told by Doherty that Sullivan gave Doherty money which Sullivan attributed to Uncle Joe. It is the government who has special agents of the F.B.I. as well as Postal Agents, etc. who are sufficiently trained to the point where it is inconceivable that no agent of the government followed Doherty's lead to Sullivan.

If Sullivan corroborated Doherty, pressure could have been put on Masiello then, and Joseph Brasco at least with Doherty could have been included in the indictment found against Masiello and his 34th Street Post Office cronies. *]

If Sullivan proved Doherty a liar by establishing another source for the $2,000. Doherty reported getting, the investigation of the Brascos would have been dropped as it was. The government possessed a monopoly of access to the truth.

*] See U.S. v Masiello, et al., 69 CR 417 Docket # 34769, remanded - 434 F2d 33 (2d Cir., 1970) aff'd 445 F2d 1324 (2d Cir., 1971)

POINT III

REPLYING TO RESPONDENT'S POINT III - CONCERNING THE INSUFFICIENCY OF THE PROOF TO ESTABLISH A CRIME.

We reply in seriatim to the items in respondent's Point III, pp. 84-89.

The text of pages 84-85 is a statement of respondent's conclusion.

The footnote on page 85 containing the alleged "false statements" in appellant's main brief, is headed off with respondent's reply to appellant's claim that he received no actual or contemplated money or benefit in the case, which respondent describes as "technically accurate". (More about money and "false statements" below).

The entire government case is described on page 86 and the first paragraph of page 87.

The first sentence on page 86 is entirely conclusory.

Next, respondent points out that Brasco, according to Doherty, asked him to advise Masiello on what to bid; that Brasco "schemed" with Doherty and Weiner to have another Masiello-controlled company apply for the contract; and that Brasco failed to tell Tim May about Masiello's record. The government then goes on to describe these as "classic examples" of "conspiracy to defraud", citing four cases, each of which is plainly distinguishable from this case.

United States v Johnson, 383 U.S. 169 (1966) involves the acceptance by appellant of substantial sums of money. There was no question as to whether he knew money was passed. He received it.

Haas v Henkel, 216 U.S. 462 (1910) attacks the sufficiency of a pleading. The pleading was held sufficient because it alleged that Haas paid bribes. Moreover, unlike the instant case, Haas involved specific departmental rules and regulations forbidding the disclosure of reports. (See 30 S. Ct. at p. 254).

In United States v Sweig, 441 F2d 114 (2nd Cir.), cert. denied 403 U.S. 932 (1971) the only charge that Sweig was convicted of and which he attacked upon appeal was the charge or perjury.

Finally, in United States v Peltz, 433 F2d 48, 51 (2nd Cir.), cert. denied 401 U.S. 955 (1971), appellant was accused, among other things, of using call girls to bribe an S.E.C. employee and an expectation of "money as well".

On the other hand, in this case Doherty plainly provided no inside information to Masiello concerning what to bid. When the bids were opened, there were in fact higher bids, and Masiello didn't get the contract on that occasion. The Doherty "information" to Masiello was in the nature of telling Masiello that experience teaches that bids over $33. per day are never likely to prevail. This was the kind of information to bidders that was readily available in the open market place, and involved no compromising of the interests of the post office department.

The charge that Brasco helped Masiello-controlled companies to try to re-enter the post office, is equally empty. We note that the government has sedulously failed to answer appellant's argument, appearing at pages 101-102 of appellant's main brief, that:

> "there appeared to have been no postal procurement regulations for bidding postal contracts which barred the letting of contracts to corporations with owners, managers, or 'dummies', having criminal records. The bidding paper work submitted by postal contract applicants did not even contain a category where one could state whether a company's component members did or did not have criminal records".

In fact Tim May's department was concerned about a law suit from A.N.R.*/ Randen did actually institute a suit. See Randen v Strachan, file #68 Civil 4233, S.D.N.Y.

We are talking about the years 1967 and 1968, and not the present. The exhibits in the case make clear that nowhere on the paper work was any applicant - and invariably, applicants were corporate entities - asked whether a private individual had a criminal record. No corporate entity was ever asked whether it was affiliated in any way, directly or indirectly, with any other corporate entity which had ever been the subject of non-renewal of a contract. The corporations were not asked who "controlled" them. Officership obviously does not mean control-in-fact. In actual practice corporate officers are often law-office secretaries. It is a

*/ The language in the notice to ANR was changed from "cancelled" to indicate that the contract wouldn't be renewed.

legal status based upon appointment, and whoever is appointed and accepts the appointment is the incumbent of that office. Thus, even if no statute of limitations barred a fraud charge, there was no substantive fraud which would have here served as the object or goal of any criminal conspiracy.

At the "bottom line", the case comes down to money - alleged bribe money for Frank J. Brasco. Without a criminal agreement to receive money, there simply is no case. United States v Quinn, 111 F Supp. 870, 872 (E.D.N.Y. 1953). Moreover, without money, a congressman-attorney may permissibly advocate a firm's cause before the post office department. United States v Quinn, supra, 111 F Supp. at 872. Furthermore, "finders fee" money, pursuant to a private loan arrangement from a private source, does not involve "receiving compensation for doing any business before any [government] department" and is not criminal. As the court noted in United States v Johnson, 419 F2d 56, 60 (4th Cir., 1969):

> "it is clear that Congress did not intend to punish a Congressman for receiving a gift, contribution, or remuneration for a service not prohibited by the statute. Because receipt of money may or may not be condemned by the statute, it is reasonable to assume that Congress intended knowledge of the nature or purpose of the receipt to be a necessary element of the crime",

citing Taussig v McNamara, 219 F Supp. 757, 760 (D.D.C. 1963), cert. denied 379 U.S. 834, 85 S. Ct. 65, 13 L. Ed. 2d 41 (1964) and United States v Quinn, 141 F Supp. 622, 626 (S.D.N.Y. 1956).

The government, aware of its plight, falsifies the record and states that Joseph Brasco, who allegedly was to collect Frank Brasco's private loan finders fee, was involved in a "contemporaneous" arrangement to send $10,000. "down below" to Frank Brasco (Res. Br., p. 86). The testimony does not show any such contemporaneous arrangement in point of time or purpose. The only testimony indicating money from Joe Brasco to anyone is testimony involving money directly to Sullivan and Doherty six months before the alleged passing of $10,000. to Joe Brasco in May of 1968. The finders fee is alleged to have been discussed openly with Frank Brasco. The $10,000. was discussed at two meetings in May,1968 at Gardio's Restaurant in the Bronx, at

ONLY COPY AVAILABLE

neither of which Frank Brasco was present. The word "contemporaneous" at p. 86 of respondent's brief, is plainly calculated to mislead the court.

The government's motive for the use of the term is very clear. Since Frank Brasco was not present at the Gardio's Restaurant meetings, the government is left without a showing of knowledge upon Frank Brasco's behalf that his uncle got any money. Without bribe money, there is no case against anyone; with bribe money, there is only a case against the recipient and those alleged confederates possessing scienter. This is even true of law partners, let alone for those in the relation of uncle and nephew. United States v Quinn, 141 F Supp. 622, 627 (S.D.N.Y. 1956). As Judge Weinfeld observed in Quinn, supra, 131 F2d, at 627:

> "whether proof be direct, or by circumstances, or by inference from circumstances, the proof must be of a character as to satisfy beyond a reasonable doubt that a defendant did in fact have knowledge. It should be pointed out that it is not sufficient to find that as a reasonable person Quinn should have known the facts. What must be determined is whether there is sufficient evidence upon which the jury would be warranted in finding that in fact he had actual knowledge".

To the same effect, United States v Johnson, supra, 419 F2d, at 60, and cases therefrom cited above. Moreover, "tip"-type money, allegedly given in May of 1968 after assistance had been unconditionally rendered, does not fall within the statute. Woelfel v United States, 237 F2d 484, 488 (4th Cir., 1956). Such an after-the-fact gift would not be criminal, even if solicited, for, as the court in Woelfel observed:

> "it would not be possible for prior 'decision or action' of an employee to be affected by later, unanticipated gifts,however rewarding they might be".

Finally, without sufficient proof of conspiracy to defraud, the piling up by the government of a so-called "mass of corroboration" (Res. Br., 87-89) does not suffice. Even if Frank Brasco had not disputed the meetings, phone calls, and other events appearing on the respondent's list, such meetings, phone calls, and other events must be corroborative of crime for the government to prevail. For if, as here, all the meetings and phone calls merely corroborate other meetings and phone calls - if all they establish is that the government witnesses have better memories than the

defense witnesses - they are unavailing.

The government is on the horns of a dilemma. If Frank Brasco agreed to enter a bribery conspiracy, that would suffice. If, on the other hand, crime - not insensitivity, but crime - was lacking, no amount of card-stacking and piling up of meetings and phone calls will create a crime, where there is no crime. Succinctly, the government may not "manufacture" criminality any more than it may "manufacture" jurisdiction. Cf., United States v Archer, 486 F2d 670 (2nd Cir., 1973).

POINT IV

REPLYING TO RESPONDENT'S POINT IV - CONCERNING THE READBACK OF MASIELLO'S FORMER TESTIMONY.

A witness's fear for his own life, or for his family's has not heretofore been viewed by the Government as an insurmountable barrier precluding it from obtaining the fearful witness's live testimony. When the Government has wanted live testimony from a fearful witness, it has found a way to allay the witness's fears so that he will take the stand.

In United States v. Franzese, 392 F2d 954, 959 (2nd Cir., 1968) vac. other gr. 391 U.S. 310 (1969), the Government was able to obtain live testimony from various witnesses who had been in fear for their own lives and who had believed their families would be harmed if they testified against the defendant. In United States v. Scandifia, 390 F2d 244, 250 (2nd Cir., 1968) vac. other gr. 394 U.S. 310 (1969), a witness testified despite the fact that prior to trial his "family had received threatening phone calls..." and he had been "in fear of my family's life..." See also United States v. Berger, 433 F2d 680, 683-84 (2nd Cir., 1970) and United States v. Cirillo, 468 F2d 1233, 1240 (2nd Cir., 1972), where witnesses testified despite the fact that they had been in fear for their lives.

Indeed the fearful witness, who initially refuses to cooperate with the government or to testify because of threats, seems to be ordinary grist for the prosecutor's mill. Knowing they will encounter him, both prosecutors and judge have invariably devised ways for allaying the witness's fears and obtaining his live testimony.

In United States ex rel Bruno v. Herold, 408 F2d 125, 127 (2nd Cir., 1969), a state court judge gave a particularly vivid account of a prosecution witness who was "speechless" with fear, and who, nevertheless, testified:

> At some time before Di Bari testified, the trial judge was made aware of the fact that Di Bari was in "mortal fear of the 'gang in the courtroom.'" When Di Bari was sworn as a witness, the judge observed "thirty or forty people who were there, and they leaned, some of them leaned forward and grinned and grimmaced, and this man sat facing them. And he turned as white as a sheet and his hands trembled, and he was speechless."

The point we make is that when the government really wants live testimony, it has a whole panoply of devices to secure such testimony from a recalcitiant, fearful witness. In the five cases cited above, which are only a representative handful, the government was able to obtain live testimony in cases where the actual danger to the witness and his family was enormously more real than it was in this case. In contr ast, in this case, the prosecutor acknowledged that "there may come a time when I could compel him (Masiello) to testify. I don't know whether I am going to do that..." (T 789); the prosecutor then failed to ask the court to impose the kind of contempt sanctious which his office and the Solicitor General have stated are best designed to overcome a witness's recalcitrance; the court promised Masiello an "A-2" sentence on the contempt (App. Br. p. 118); and when Masiello's attorney argued for lieniency and a concurrent sentence on the contempt, the government (despite its current disclaimer, Resp. Br. 12) joined in the lieniency plea by stating:

> "Mr. Gold: Your Honor, at this juncture, I would only state that it is my understanding that Mr. Wall's protrayal of the facts in this matter has been completely accurate, and I would have nothing other to add other than what we all know.
>
> Mr. Masiello was a terribly important witness in a terribly important trial. (Contempt sent. min. 7/26/74, p. 10).

As an extra dividend, Mr. Masiello was not indicted, though he is named as an unindicted co-conspirator, in United States v. Cohen, 74 Cr. 48, a bank fraud case stemming from fraudulent loans to Masiello controlled companies, including U.N.R. now pending in United States District Court for the Northern District of New Jersey. Nor has he been required to testify in that case.

The relationship between the government and a government stool pigeon witness is such that when the Government wants his in-court testimony, the Government can secure it. Since the prosecution, and the court, did not use all available means at their disposal to compel Masiello's testimony, he cannot be deemed an "unavailable" witness for Sixth Amendment purposes.

Respondent contends (Resp. Br. p. 91) that Masiello's motivation goes eyond the question of availability. Not so! If Masiello had a deal with Mr. Shaw hereby Masiello could show organized crime that he wouldn't testify, then Mr. Shaw ould have made Masiello available by the methods indicated in our brief in chief; to it, he could have considered the deal breached in its entirety and acted accordingly.

Appellant wonders whether Masiello will be spared the need to testify in a rial of Joseph Brasco, appellant's co-defendant.

As to the witness Himmel respondent claims that the Government did not scover him until the second trial (Resp. Br. p. 93). Not so. Agents questioned mmel before the first trial about Frank Brasco in connection with this case, but spondent chose not to use him during the first trial when Masiello was "available".

POINT V

REPLYING TO RESPONDENT'S POINT V - CONCERNING THE FIFTH AMENDMENT VIOLATION AND VARIOUS OTHER PREJUDICIAL ITEMS.

In both the first and second Brasco trials the government in its opening statements* d through direct testimony of prosecution witnesses as well as in summation repeatedly ought out that Brasco had refused to give a sworn statement to the F.B.I.

Respondent seeks to justify this occurrence by stating that "the refusal to ear to a written statement voluntarily given might well suggest to a jury that the fusal was the product of a mind concerned with the risk of the penalty for perjury cause the information contained in the statement was known to be false (Resp. Br. p. 97). pellant concurs with respondent's compelling logic and submits that that is precisely the evil of the error. Not only have courts recognized the need to restrict evidence owing a consciousness of guilt as previously indicated in appellant's brief, but the se at bar involves constitutional fifth amendment privileges. It is certainly clear l well established that when a general evidentiary rule conflicts with a constitutional ght the general rule must give way. Thus for example although a defendant's refusal

---

*The evidence was thus not as the respondent's brief infers at page 97 casually vealed but was specifically and deliberately brought to the jury's attention by government.

ONLY COPY AVAILABLE

o make a statement could conceivably show consciousness of guilt, comment on such
n action by the prosecution has been specifically forbidden. Miranda v. Arizona,
84 U.S. 436 (1963); Griffin v. California, 380 U.S. 609; Johnson v. Paterson, 475
2d 1066 (10th Cir., 1973); United States ex rel Macon v. Yeager, 476 F2d 613 (3rd Cir.,
973); See generally appellant's brief pp. 124-125. Similarly if comment on the
efusal to testify or give a statement is barred logically, it is also improper to
ake a comment on the right of an individual not to swear.

With respect to the admission of prior trial testimony and Brasco's F.B.I.
tatement prior to the time that the appellant testified, there was no basis in fact
the record to conclude that these items constituted false exculpatory statements.
the case of United States v. McConney, 329 F2d 467 (2nd Cir., 1964) cited by
spondent in its brief at page 98, this court clearly indicated at page 470 that it must
shown that the statements are in fact false before their admission will be considered.
the case at bar, for example, any change made by Brasco regarding the exact date of
s first meeting with Masiello could easily be explained by a legitimate failure of
collection due to the passage of time. Masiello himself stated that he had no
dependent recollection of dates and Brasco specifically told the F.B.I. that the
atement was "to the best of his recollection" and that they were free to talk further
th members of his staff.

With respect to the alleged agreement to split a fee for Masiello's loan,*/
e answer to respondent's contention that no pre-trial motion was made is that the
tuation did not unfold until the prosecution proceeded with its proof. Mr. Shaw, in
ct, specifically stated in response to a pre-trial defense motion for particulars
aring upon the statute of limitations, that defense was jumping the gun and anticipating
idence and should wait until the proof unfolded before an attack against the case could
pen. The appellant further amply raised the issue as soon as possible particularly
ring trial and in its motion relating to the statute of limitations issue. It should

*/ The discrepency in Doherty and Weiner's testimony as to the fee arrangement this matter should be noted (T 1351, 263, 264).

urther be noted the case of United States v. Aloi, cited by respondent at page 101 as not decided on the basis of multi-conspiracy argument.

Further in the case at bar, the comments on the appellant's refusal to swear, the introduction of the F.B.I. statement on the government's direct case, and he reading of his prior testimony also during the government's direct case, substantially rejudiced the appellant, not only by their direct effect on the jury but also because he appellant's option to testify or not to testify was, in effect, foreclosed by the ission of the statements and items referred to above. The government, by raising he issue, in effect forced Brasco to testify, since his failure to do so coupled with he jury's information that he had previously refused to give a sworn statement would ave led them to speculate on the issue of guilt no matter what curative instructions ould have been given. It has been clearly recognized that it is a violation of the efendant's privilege against self-incrimination to improperly, such by unwarranted comment the court or prosecutor, place him in a position where he must testify in order to avoid y adverse inference that may arise from his failure to do so, or to place restrictions the free exercise of the right to remain silent. (21 Am. Jur. 2d 356; Harrison v. ited States, 392 U.S. 219 (1968); State v. Hines, 195 So.2d 550 (Sup. Ct., Fla. 1967); ooks v. Tennessee, 406 U.S. 605 (1972). In Harrison v. United States, supra, in fact, e Supreme Court reversed a conviction where on retrial, the prosecution was allowed to ad testimony at the first trial , when his testimony at the first trial was a result the improper admission of an illegally obtained confession. In Brooks, supra, the preme Court held it to be a violation of constitutional rights to force the defendant testify first, if he was going to take the stand. Similarly, in the case at bar, asco's testimony at the trial resulted from the effective denial of his right to a ee and independent choice as to whether to testify, by improper rulings of the court ow.

POINT VI

REPLYING TO RESPONDENT'S POINT VI - CONCERNING THE MAFIA AND MEADE ESPOSITO.

Respondent asserts that the infusion of the term Mafia and prosecution reference to organized crime were justified by the fact that Brasco's knowledge of Masiello's background was an issue. This is a feeble attempt to justify an unjustifiable position. How would reading to the jury, for example, as occurred in the case at bar that Masiello, Jr. was charged with first degree assault in connection with the fatal beating of one man and the blinding of another, or that McKeever had a long history of arrests have to do with Brasco's knowledge of Masiello, Sr.'s background. The prosecution offers no reasonable explanation why this highly prejudicial yet irrelevant material could not have been redacted. The failure to excise that portion of the testimony during the first trial regarding this matter, particularly when Masiello was not physically present at the second trial lending the jury to certainly wonder about his disappearance was certainly highly prejudicial.

Respondent's statement with regard to the Meade Esposito matter that no prejudice could have occurred because during the voir-dire the trial jurors stated that they saw no publicity linking Brasco to Watergate neglects to take into account the statement of the juror Carole Lazarou to Barbarino that Gloria Chiang said that she was of the opinion the appellant was involved with the Watergate situation. (Barbarino's aff'd., p. 7).

Marshalls in the Courtroom.

Respondent fails to discuss the way marshals were introduced to the jury in the courtroom. The marshals were in the courtroom in plain clothes not identifiable. Then they were asked to stand and did so. The jury in the second trial learned that this had happened in the first trial. In the second trial no marshals were identified in court. Nor was Masiello on the witness stand. What better confirmation of the News article that Masiello refused to testify against Brasco because he was afraid of mob vengeance. (Please see colloquy T 1788-1797 for appellant's attempt to mitigate the effect of this rereading).

CONCLUSION

For all the foregoing reasons, the judgment appealed from must be reversed and the indictment dismissed. Alternatively, the case should be remanded for a new trial.

Dated: Kew Gardens, New York
March, 1975.

Respectfully submitted,

LYON & ERLBAUM
Attorneys for Appellant

HERBERT A. LYON
GRETCHEN WHITE OBERMAN
SPIROS A. TSIMBINOS
WILLIAM M. ERLBAUM
CHARLES WENDER
Of Counsel

SUPPLEMENTAL APPENDIX

GOVERNMENT'S EXHIBIT 24

October 23, 1968

Randen Trucking Corporation
123 Frost Street
Westbury, New York 11590

Gentlemen: Re: Trailer Solicitation 69-41 Truck Hire

This is to advise you that your bid has been rejected and an award will be made to the next lowest responsible bidder under the above entitled solicitation.

The basis of rejection of your bid is that your firm does not meet the criteria of a responsible prospective contractor on the basis that your firm is deemed to lack the requisite integrity under Federal Procurement Regulation 1-1.310-5(a)(4).

We desire, however, to continue to hire your tractors on an emergency basis until an award is made.

Sincerely,

JOHN R. STRACHAN
Postmaster

JUN 25 1974

A-1

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

DEFENDANT'S EXHIBIT A-1

VEHICLE OPERATIONS
New York, N. Y. 10001

Case # 69-565
VO:WDiff

NEW ADDRESS

December 16, 1968

Ber Mur Leasing
~~777~~ 3rd Ave. (~~suite 3250~~) 36 WEST 44 ST
New York, N. Y. ~~10017~~ 10036 SUITE 1212

Dear Sir,

This is to inform you that a tractor-truck rented from you by the New York, N. Y. Post Office has been involved in an accident as follows:

Date: 12-13-68 at about 10:45 AM
Location: on Long Island Expressway, east, between 50th St. and Maurice Ave., Maspeth, N.Y.
Your vehicle: 1968 Mack, # 61-922 , Post Office No. HT-504
Post Office driver: Carl McClendon.
Private vehicle: 1968 Chrysler, Imperial, 4 dr. sedan, blue-black - lic. No. 939 MX
Private vehicle owner: Barton, Norma
19 Shorecliff Place
Great Neck, N.Y.

Driver: Bernard Barton
19 Shorecliff Pl.
Great Neck, N.Y.

Private vehicle stopped for traffic and was hit in the rear by vehicle rented by the Post Office.

Very truly yours,

John K. Strachan

John K. Strachan
Postmaster
New York, N.Y.

P.S. It is requested that you inform this office of your liability insurance carrier and send copy of such policy, using envelope enclosed.

Sent Cert. Mail 12-20-68

JUN 25 1974

A-I

A 1-2

EXHIBIT

U. S. DIST. COURT

S. D. OF N. Y.

DEFENDANT'S EXHIBIT A-2

VEHICLE OPERATIONS
New York, N.Y. 10001

Case # 69-465
VO:WLD:fl

December 16, 1968

Corporate Systems
790 Tuckahoe Rd. (apt. 1-I)
Yonkers, N.Y. 10710

Attn. Mr. J. Pasilello

Dear Sir,

This is to inform you that a tractor-truck rented from you by the New York, N. Y. Post Office has been involved in an accident as follows:

Date: 12-13-68 at about 10:45 PM
Location: on Long Island Expressway, east, between 58th St. and Maurice Ave., Maspeth, N.Y.
Your vehicle: 1968 Mack, # 61-922, Post Office No. HT-504
Post Office driver: Gene McClendon.
Private vehicle: 1966 Chrysler, imperial, 4 dr sedan, blue-black, Lic. No. 939 DJ
Private vehicle owner: Norma Burton, 19 Shorecliff Place, Great Neck, N. Y.
POV driver: Bernard Burton, 19 Shorecliff Place, Great Neck, N.Y.

Private vehicle stopped for traffic and was hit in the rear by your vehicle (rented & operated by the N.Y. N.Y. Post Office).

Very truly yours,

John R. Strachan

John R. Strachan
Postmaster
New York, N. Y.

P.S. It is requested that you inform this office of your liability insurance carrier and send copy of such policy, using envelope enclosed.

SA-3

COPY RECEIVED
(on 2) ocks
MAR 20 1975
U.S. ATTORNEY
SO. DIST. OF N.Y.

THE ALPERT PRESS INC., 644 PACIFIC., ST. BKLYN. N.Y.